82-1858

NO.

IN THE

Supreme Court of the United States

October Term , 1983

STANLEY SEYMOUR PALMER, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

William L. Cofer, Esquire
COFER AND MITCHELL
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

QUESTIONS PRESENTED FOR REVIEW

I. In the face of Fourth Amendment prohibitions, is the search of premises under an improper warrant (one which wrongly designates the place to be searched) redeemed by petitioner's subsequent execution of inventory sheets which incorrectly reflect (in filled in blanks) that items seized have been taken from the premises named in the warrant?

II. If so, should the finality and ramification of such an "admission" require the trial court to determine in hearing whether the inventory sheets were signed voluntarily, understandably and upon the advice of counsel as mandated by the Fifth Amendment to the United States Constitution, Title 18, U.S.C. § 3501 and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.

1602, 16 L.Ed.2d 694 (1966)?

III. Was petitioner denied the speedy trial protections established by 18 U.S.C. § 3161, et seq.?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

OPINIONS BELOW

The opinion below by the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction in the United States District Court for the Middle District of North Carolina has been designated for publication but has not been published at the time of the submission of this petition. A copy of the opinion is set out in full in the appendix. Motion for stay of mandate was denied by the Fourth Circuit on April 19, 1983.

Following a suppression hearing and prior to trial, a memorandum and order was entered by the district court on January 2, 1981 granting defendant Palmer's motion to suppress certain evidence obtained as a result of a search warrant which the court determined described different premises

from the ones actually searched by federal agents. From this suppression order the government took an interlocutory appeal, and in a divided opinion dated December 23, 1981, the United States Court of Appeals for the Fourth Circuit reversed, ruling that the search in question had been redeemed by defendant Palmer's signing of certain FBI inventory sheets which designated (albeit incorrectly) the premises searched as those described in the search warrant. United States v. Palmer, 667 F. 2d 1118 (4th Cir. 1981).

A copy of the published Fourth Circuit opinion is included in the appendix hereto. Petition to rehear and motion to stay mandate pending application for certiorari were denied.

JURISDICTION

The petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit dated April 5, 1983 affirming his conviction in the United States Court for the Middle District of North Carolina for violations of 18 U.S.C. § 1955 and 18 U.S.C. § 1952 (a)(3). Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1)(1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U. S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized.

U. S. Constitution, Amendment V:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

18 U.S.C. § 3501(e):

... The term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally in writing.

18 U.S.C. § 3161(b):

Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested...

F.R. Cr. P. 41(c)(1):

...If the federal magistrate or state judge is satisfied that grounds for application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched.

STATEMENT OF THE CASE

On October 27, 1980 petitioner was

indicted with eight others for allegedly conducting an illegal bookmaking business in violation of 18 U.S.C. § 1955. Petitioner was charged additionally with use of an interstate facility (a telephone) in violation of 18 U.S.C. § 1952(a)(3) and (2).

Pleas of not guilty were entered on behalf of petitioner at his November 3, 1980 arraignment. Petitioner was given until November 12, 1980 to file pretrial motions. Trial was set for December 8, 1980.

Pretrial motions were filed in a timely fashion by counsel for petitioner. These were heard as originally scheduled.

Motion for severance made by petitioner was denied as was his motion to dismiss for speedy trial violations. But in a detailed memorandum and order entered

January 2, 1981 the district court granted petitioner's motion to suppress the search made in his case.

From this suppression order the government took an interlocutory appeal. In a divided opinion dated December 23, 1981 the Fourth Circuit panel which heard the matter reversed, ruling that the search in question had been redeemed by petitioner's "admission" in signing inventory sheets that the premises entered were those designated in the warrant. United States v. Palmer, 667 F.2d 1118 (4th Cir. 1981). Motions for rehearing and for stay of mandate pending application for certiorari to the United States Supreme Court were denied and the matter was remanded to the district court for trial.

Prior to trial, petitioner, refiled and reargued motions to suppress, to sever

and to dismiss for violations of speedy trial provisions. These motions were denied.

Petitioner's trial in the district court substantially reestablished the facts found by the court in its January 2, 1981 suppression order. Testimony and exhibits adduced that on Sunday, December 16, 1979, federal agents carried out several simultaneous "gambling raids" in adjoining piedmont North Carolina counties. The search directed against petitioner took place at a small, rural shopping center just outside Winston-Salem, North Carolina.

In petitioner's case, F.B.I. agents, armed with search warrants for "the premises known as Carl's Carpet Mart, Inc." (an active retail business at the northernmost end of the subject shopping center), conducted their search instead in a fully

separated, middle space of said shopping center, an area plainly designated by exterior signs as "Miller-Arrington". In two months of close agent surveillance petitioner had never been seen to enter or exit Carl's Carpet Mart or any other parts of the shopping center except the "Miller-Arrington" space. Nor was it shown (by wire intercept or otherwise) that he ever used the telephones which were seized in the search of the "Miller-Arrington" premises.

On the afternoon of the "gambling raids" and within seconds of their gaining access to the "Miller-Arrington" space, agents placed petitioner in "custody". He remained in custody for some three hours while officers first searched and then lingered on the premises trying to intercept incoming telephone calls.

Before departing, agents had petitioner routinely sign an inventory sheet into the blanks of which they at some point erroneously described the searched premises as "Carl's Carpet Mart". (In fact Carl's Carpet Mart was never searched, or even entered.) Petitioner had previously asked for the chance to get in touch with his attorney, but had been denied the opportunity to do so from an operable telephone.

A jury returned a verdict of guilty against petitioner and five of the six co-defendants tried with him and judgment was entered on March 1, 1982. Petitioner and two others appealed.

On April 5, 1983 the United States Court of Appeals for the Fourth Circuit affirmed petitioner's conviction, but reversed the convictions of his co-appellants

for insufficient evidence. In its opinion (not yet published, but included in the appendix hereto) the Court of Appeals concluded that the evidence seized in the disputed search, coupled with the governments expert's interpretation of said evidence, was sufficient to support petitioner's conviction. The Court rejected petitioner's reargurments, raised again herein, regarding defective search, involuntary admissions, and speedy trial.

ARGUMENT

I. A DEFENDANT'S SUBSEQUENT EXECUTION OF INVENTORY SHEETS IN THE BLANKS OF WHICH AGENTS INCORRECTLY STATE THE NAME OF THE PLACE THEY HAVE SEARCHED (TO CONFORM TO THE WARRANT) SHOULD NOT REDEEM A SEARCH OF PREMISES NOT DESIGNATED IN THE WARRANT INITIALLY.

The District Court originally (and properly) suppressed the seized evidence in this case. Its suppression order followed a hearing wherein testimony and exhibits clearly established that officers conducted their search not at "Carl's Carpet Mart" (as directed by the warrant) but at an adjacent store in the same small shopping center, a store separated from Carl's by an unbroken party wall, one whose front entrance was clearly labeled "Miller-Arrington", and the only premises into and out of which defendant Palmer (now the petitioner) was ever seen to enter or exit.

On the government's interlocutory appeal from the suppression order the Fourth Circuit panel which heard the matter voted two to one to reverse. United States v. Palmer, 667 F.2d 1118 (4th Cir. 1981). The panel majority, while tacitly admitting that the disputed search was improper, nevertheless held that because the subject defendants allegedly signed several form-type, seized-property inventory sheets, in the blanks of which agents at some point had written in "Carl's Carpet Mart" or "Carl's Carpet", the unlawful search was redeemed.

The majority opinion cited the signatures on the inventory sheets as an "admission" that the search took place on the premises authorized. The signed statements were interpreted as "uncontroverted evidence" that defendant Palmer and a co-

defendant regarded the premises they occupied as indeed being a part of Carl's Carpet Mart. The majority opinion declined to hold that the searched premises were not those described in the warrants "when the defendants themselves obviously regarded them as the same".

In his well-reasoned minority opinion Circuit Judge Hall insisted that the majority "unduly emphasized a document which is nothing more than an inventory sheet". His dissent pointed out that the significance of the inventory sheets would almost certainly be lost on the defendants in the confusion surrounding the search. He concluded with the straightforward observation that "any attempt to justify the search is an exercise in post hoc rationalization".

Whatever the rationale, and giving

it all due credit for assuring petitioner's ultimate conviction, the Fourth Circuit ruling in this case sets a precedent of "plain bad law", and one which, if left to stand, will cause far more harm than good to law enforcement efforts. Inventory sheets, after all, are employed to protect officers and avoid trial controversy by clearly establishing what property was and was not taken in a given search. Against the bizzare Palmer decision (in effect reaffirmed on the recent appeal), suspects no doubt will become increasingly reluctant to sign inventory sheets, or any other routine document, for fear of the unforseen implications of their signatures.

If the labored redemptive theory is discarded, as it rightfully should be, the facts of this case fall fully within United States v. Kaye, 432 F.2d 647 (D.C.

Cir. 1970) and Keiningham v. United States 287 F.2d 126 (D.C. Cir. 1960). In Kaye the United States Court of Appeals for the District of Columbia held that where the warrant under which the search was conducted authorized the search of 3618 14th Street (the defendant's store) the search of defendant's apartment, which was above the store, but had no door or direct passage to it, was unlawful, even though the description in the supporting affidavit was of "a two-story brick building" in which both the store and the apartment were located. (Interestingly, in Kaye the bills for gas, electricity, and telephone service for both areas, store and apartment, were sent to the defendant.)

In reversing defendant Kaye's conviction the D. C. Circuit Court observed:

"The store and apartment were not an

integrated unit but were two separate and distinct parts of the building. There was no access to the apartment from the store and no apparent connection between the two. The arrangement is typical of that so frequently existing in urban communities where living quarters are found over stores. When a store and an apartment are thus arranged a warrant authorizing search of the store——as this warrant did——can hardly be stretched to justify an intrusion into the apartment, regardless of language in the supporting affidavit which might be construed more broadly. (Omitting cites.) It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched."

In Keiningham, supra, the court, in holding that the trial court should have allowed appellants' motion to suppress stated:

"The Government contends that since appellants were using the two houses as a single unit, the search warrant for 1106 should somehow be construed to embrace 1108 as well. It seems to be the Government's theory that 1108 became a part of 1106 because of the use to which the two houses were put

> by appellants. This contention is unsound. We know of no clause in the warrant issued extending the authority granted therein in the event of unforseen circumstances, and it is well settled that search warrants must be strictly construed. The authority to search is limited to the place described and does not include additional or different places." (Emphasis supplied.)

In petitioner's case, the search warrant provided for the search of Carl's Carpet Mart, but the entire search was conducted at the adjacent area, "Miller-Arrington". There should have been no difficulty in separately describing each for search purposes. A large "Carl's Carpet Mart" sign extended along the front of that store. A glass panel over the front door of the searched premises was clearly marked "Miller-Arrington".

There was absolutly no internal access between the two shopping center spaces and no real reason to suspect that

the two connected. Agents discovered nothing during a sham shopping trip inside Carl's Carpet Mart to support a physical connection with the adjacent "Miller-Arrington" location. More importantly, at no time did surveilling officers see petitioner or any other defendant go into or come out of any part of the shopping center except the Miller-Arrington space.

At first glance the facts in the instant case seem ripe for application of the "good faith" exception suggested in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). Closer examination shows otherwise.

As the Williams dictum conceded, and good sense requires, "good faith" alone is not enough:

> "We emphasize that the belief, in addition to being held in subjective

> good faith, must be grounded in an objective reasonableness. (Emphasis supplied.) It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully." United States v. Williams, supra, 841.

No objective person, being familiar (as were the agents in the case on appeal) with the shopping center in question, could have reasonably believed, upon the slightest reflection, that a search warrant for "Carl's Carpet Mart, Inc." would fairly describe and authorize an invasion of the premises actually searched.

When all is said and done in the present case the answer to one elementary question is really determinative of the central issue:

> COULD INVESTIGATING OFFICERS HAVE COOPERATED WITH THE MAGISTRATE TO DEVISE AN UNAMBIGUOUS DESCRIPTION OF THE PREMISES THEY INTENDED TO SEARCH?

Clearly they could have.

As the District Court observed in suppressing the search of the premises occupied by petitioner:

> "...having identified the rear offices of Area "B" as the situs of the suspected illegal activity, government agents could have either sought an additional warrant which particularly identified those premises as the area to be searched or included a specific description of the offices in the rear of Area "B" on the warrants actually obtained."

In sum, as Judge Hall concluded in his Fourth Circuit dissent, and as the diagram he incorporated clearly shows, "this case arose as a result of the agents' çarlessness". These agents had two months to determine where they wanted to search. They should have obtained a proper warrant to search the Miller-Arrington store. Their failure to do so should cause the forfeit of the evidence seized.

II. IF A DEFENDANT'S EXECUTION OF INVENTORY SHEETS IS TO BE CONSTRUED AS AN INCRIMINATORY ADMISSION AND, IN EFFECT, A WAIVER OF FOURTH AMENDMENT RIGHTS, A HEARING SHOULD BE REQUIRED, UPON REQUEST, TO DETERMINE WHETHER SUCH "ADMISSION" WAS MADE VOLUNTARILY, UNDERSTANDABLY AND UPON THE ADVICE OF COUNSEL.

At a hearing in the District Court upon his renewed motion to suppress, petitioner proffered evidence that, after being advised of his rights, and before signing the inventory sheets which agents placed before him, he asked to call his attorney but was not given a reasonable opportunity to do so. The presiding judge refused to receive this or any other evidence pertaining to the circumstances surrounding the execution of the incriminating forms. Trial testimony confirmed that petitioner had been placed in "custody" at the outset of the disputed search and detained thereafter for some

three hours.

A long line of cases culminating with Miranda v. Arizona, 384 U.S.C. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) and the enactment of Title 18, U.S.C. § 3501 requires that a confession be voluntarily given. The relevant code provision defines confession as:

> "...any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

When, as here, a defendant's "admission" puts him in possession of alleged "gambling evidence" and constitutes a waiver of his Fourth Amendment rights, the burden should be upon the government to show, and every effort should be made to insure, that it was voluntarily supplied. To proceed otherwise would give officers a sure license to guarantee every search and

seizure in advance by obtaining from the subject defendant (by whatever deceit or duress necessary) an admission that all was properly done.

III. PETITIONER WAS DENIED THE SPEEDY TRIAL PROTECTIONS ESTABLISHED BY 18 U.S.C. § 3161, et seq.

The government's evidence at trial established that petitioner was taken into "custody" at the Miller-Arrington store on December 16, 1979 (the date of the disputed search) and was restrained and detained there for over three hours while officers searched him and a co-defendant, seized pads, pencils, sports information publications, trash cans, and similar items from small connecting offices, and intercepted several in-coming telephone calls.

Some ten months later, on October 27,

1980, and based on "evidence" seized in the December 16, 1979 search, petitioner was indicted. Motions and renewed motions to dismiss the indictment for prosecutorial delay and for non-compliance with speedy trial were heard and denied.

Granting that, within bounds, a person may be required to remain on premises during the execution of a valid (query here?) search warrant, detention should be limited to reasonable necessity. Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). United States v. Timpani, 665 F.2d 1 (1st Cir. 1981)

The extended detention here far exceeded any legitimate search requirements and amounted to an arrest. Sharpe v. United States, 660 F.2d 908 (4 Cir. 1981).

18 U.S.C. § 3161(b) mandates:

> "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days (emphasis added) from the date on which such individual was arrested..."

By definition, petitioner was arrested on December 16, 1979. His indictment on October 27, 1980 was not timely under 18 U.S.C. § 3161(b) and, for this reason, the indictment should have been dismissed.

CONCLUSION

Based on the foregoing, the petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

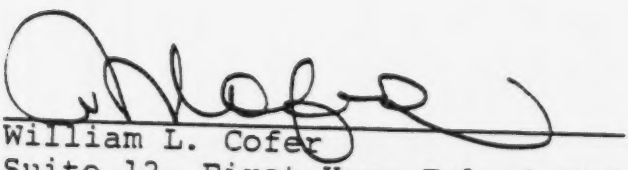
William L. Cofer
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

CERTIFICATE OF SERVICE

I hereby certify that I have on this 3rd day of May, 1983 mailed three copies of this petition, first class postage prepaid, to each of the following parties:

Douglas Cannon
Assistant U. S. Attorney
Post Office Box 1858
Greensboro, North Carolina 27402

Solicitor General
Department of Justice
Washington, D. C. 20530



William L. Cofer
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5061

UNITED STATES OF AMERICA,

Appellant

v.

STANLEY SEYMOUR PALMER and
STEPHENSON ALEXANDER PRICE,

Appellees

Appeal from the United States District Court for the Middle District of North Carolina, at Salisbury. Richard C. Erwin, District Judge.

Argued August 5, 1981
Decided December 23, 1981

Before RUSSELL, WIDENER and HALL, Circuit Judges.

Sidney M. Glazer, Department of Justice (Henry M. Michaux, Jr., United States Attorney, on brief) for Appellant, Eddie C. Mitchell and William L. Cofer for Appellees.

WIDENER, Circuit Judge:

This is an interlocutory appeal from the order of the district court granting the motions of defendants to suppress evidence seized pursuant to search warrants. The whole question presented is whether the search warrants particularly described the place to be searched, as required by the Fourth Amendment. The defendants ask us to hold that the search was conducted on premises other than those described in the search warrant, i.e., "Carl's Carpet Mart." We reverse.

On October 27, 1980, appellees Stanley S. Palmer and Stephen A. Price,

along with seven others, were indicted for carrying on an illegal bookmaking business and for using the interstate telephone system to obtain information used in receiving and placing bets on sporting events, in violation of 18 U.S.C. § 1955, 1952(a)(3) and 1084(a). The indictments followed an extensive F.B.I. investigation, which culminated in the execution of the search warrants in question against the several defendants in December, 1979.

At issue in this appeal are the two warrants to search Palmer and Price and Carl's Carpet Mart on December 14, 1979 and executed on December 16, 1979. The warrants authorized a search of the persons of Palmer and Price "at Carl's Carpet Mart, Inc., New Lexington Road, Route 11, Box 246, Winston-Salem, North Carolina"

and the premises of Carl's Carpet Mart, Inc., at the same address. No further description was given on the face of the warrants. The warrants were issued by a United States Magistrate on the basis of the affidavit of Special Agent Schatzman, who had conducted the F.B.I. investigation.

The affidavit, 34 typed pages in length, sets out probable cause to search in detail and abundance. It asserts that the F.B.I. had learned through informants of the bookmaking activities of Palmer and Price during the summer of 1978. Between August 28, 1979 and December 6, 1979, various unnamed informants advised F.B.I. agents that Palmer and Price were conducting their bookmaking business over telephone numbers 764-4900 and 764-4901. Records of Southern Bell Telephone Com-

pany showed that these two telephones were billed to Carl's Carpet Mart, as were two other telephones. Toll records for these phones for August through November 1979 revealed several hundred calls to other suspected participants in the bookmaking operating, as well as numerous calls to sports information services in New York and Los Angeles.

The F.B.I. conducted spot checks of the suspected bookmaking operations between October 23, 1979 and December 9, 1979. Carl's Carpet Mart is located at one end of an L-shaped shopping center, containing three other business premises. On the roof over Carl's Carpet Mart is a large sign stating the name of the establishment. That store has three sets of double doors in front. Adjacent to Carl's

Carpet Mart are premises the front part of which had been formerly occupied by Miller-Arrington appliance store. The name "Miller-Arrington" is written on the glass above the entrance, which is the fourth set of double doors from the left. The showroom area of those premises was rented by Lacey Miller at the time the warrants were executed. He conducted periodic antique auctions there. From the public area of Carl's Carpet Mart and the outside of the Miller-Arrington premises, an unbroken plywood panel partition between the two premises was visible which extended from the front of the building to about two-thirds the way to the back. A private area containing restrooms was located at the rear of Carl's Carpet Mart, obscuring the remainder of the interior

plywood partition from the view of agents conducting the surveillance. Similarly, the rear of the Miller-Arrington premises was partitioned off into private offices. Price paid the rent on those premises as well as reimbursing the considerable telephone bill to Carl's Carpet Mart.

On several occasions during the surveillance period, Agent Schatzman observed Price and Palmer entering or leaving the Miller-Arrington premises. They always used the fourth set of double doors from the left. Schatzman testified at the hearing on the motion to suppress that he had never observed either Price or Palmer use any of the first three sets of double doors on the left, but always the fourth.

When F.B.I. agents, including Schatzman, executed the search warrants at issue,

they entered through the doors with "Miller-Arrington" written on them, the fourth set of doors from the left which Price and Palmer had used. They searched the enclosed area at the back of the premises, that which was rented by Price, which consisted of several cubicles. The telephones bearing numbers 764-4900 and 764-4901 were both found in the back cubicles. The agents found no door connecting those premises with those of Carl's Carpet Mart. The agents did not search elsewhere.

After the search was conducted, returns on the warrants were made, listing the items seized. A separate return was made for each search of the person as well as one for the premises. Following the list of items seized on the return for

"these premises" was the following statement:

> This is to certify that on December 16th 1979 at Davidson Co. North Carolina, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, at the time of conducting a search of (...)[1] premises at Carls Carpet Mart, obtained the listed items. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.
>
> (Signed) (s) Stanley S. Palmer
> (Signed) (s) S. A. Price

In addition, Price and Palmer each signed a statement on the return of the search warrant for his person in almost identical language to that just quoted above. That of Price described the premises as

---

1. The word "or" has been omitted in copying, it obviously having not been marked through by mistake.

as "Carl's Carpet Mart," while that of Palmer described them as "Carl's Carpet."

Signing the statements on the returns which specified the premises searched as being those of Carl's Carpet Mart is an admission by Price and Palmer that the search took place on the premises authorized in the search warrants. The statements are uncontroverted evidence that they regarded the premises they occupied in their bookmaking operation as indeed being a part of Carl's Carpet Mart. We decline to hold that the premises searched were not those described in the warrant when the defendants themselves obviously regarded them as the same. If a warrant specifies a place under the designation by which it is commonly known, though the exact description may not be correct,

the warrant will be upheld. See United States v. Wright, 468 F.2d 1184 (6th Cir. 1972).

The order of the district court is accordingly

REVERSED.

HALL, Circuit Judge, dissenting:

The agents in this case searched the Miller-Arrington store even though the warrant authorized them to search only Carl's Carpet Mart. The majority overlooks this discrepancy because the defendants signed warrant returns in which they noted that the search was conducted at Carl's Carpet Mart. I cannot attach that much importance to a layman's signature upon the return of a search warrant, and

therefore, I respectfully dissent.

The physical layout of the two stores gives no reason to believe that they are one and the same.[1/] Although adjacent in a small shopping center, the stores are separated by a wall and have no interior access between them. (See diagram.)

1/The agents thought that the stores were connected because the telephones located in the Miller-Arrington store were listed in the name of "Carl's Carpet Mart," and because the defendants paid rent to Carl's. The agents' suspicions simply will not support this warrant. Common ownership and phone listings prove nothing. See, United States v. Kaye, 432 F.2d 647 (D.C. Cir. 1970). The owner of Carl's also owned the entire shopping center, so the defendants naturally would pay their rent at the carpet store. Further, Carl's Carpet Mart could have had extension phones all over town, but a warrant to search "Carl's Carpet Mart" would not permit agents to search each of those locations.

There is a sign on the roof directly over larger store designating it as "Carl's Carpet Mart." The doors to the other store are clearly labelled, "Miller-Arrington." The Miller-Arrington store is obviously a separate business, perhaps not a lively one at the time of the search, but certainly not part of the carpet store.

Further, the activities of the defendants gave no indication that the Miller-Arrington store was part of Carl's Carpet Mart. During the two months in which FBI agents kept the defendants under surveillance, they never saw them enter or leave through any doors except those marked "Miller-Arrington." Although armed with a warrant to search "Carl's Carpet Mart," the agents themselves did not begin

their search at the carpet store, but proceeded directly through the Miller-Arrington doors and confined their search to that store.[2/]

The majority virtually admits that the warrant was improper, but nevertheless would sanction the search because the defendants signed returns on the warrant in which they designated the searched premises as "Carl's Carpet Mart." My brethren unduly emphasize a document which is nothing more than an inventory

---

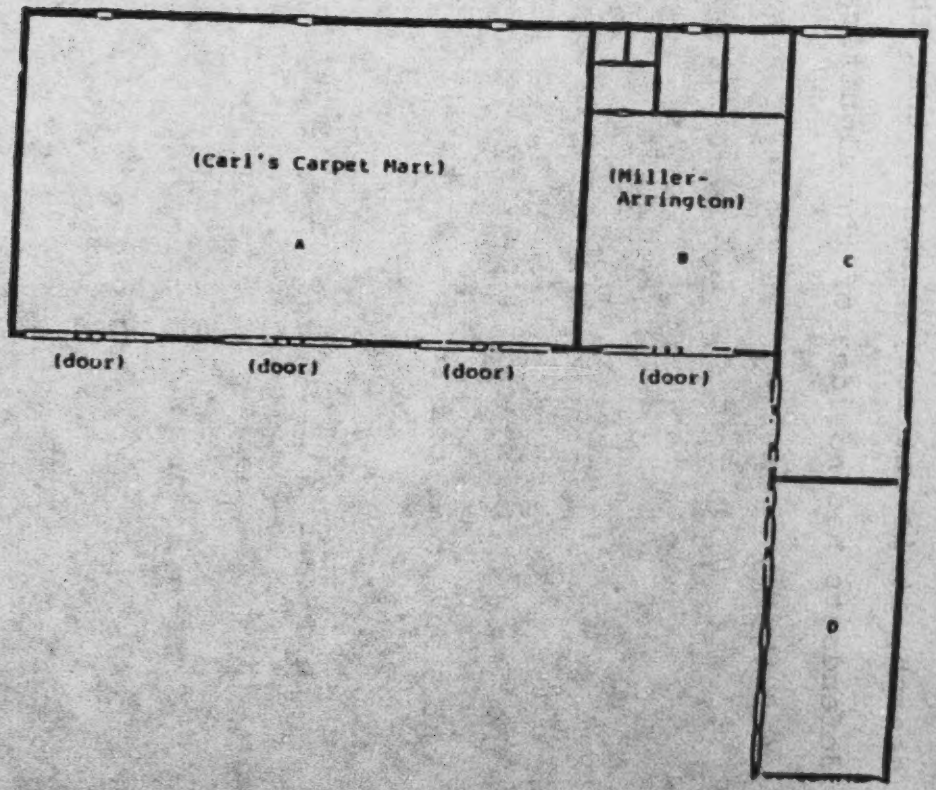
[2/]The facts of this case are clearly distinguishable from the situation in United States v. Wright, 468 F.2d 1184 (6th Cir. 1972), cited by the majority. In Wright, agents with a warrant to search "The New Plaza Lounge" searched the lounge first and then searched a sealed-up back room which, up until three weeks before the search, had been connected to the lounge by a door.

sheet. In the confusion surrounding the search, it is entirely probable that the defendants had no idea of the significance of the description on the return.

In sum, this case arose as a result of the agents' carelessness. These agents had two months to determine where they wanted to search. They should have obtained a warrant to search the Miller-Arrington store.[3/] Any attempt to justify this search is an exercise in post hoc rationalization.

I therefore would affirm the district court's decision to suppress the evidence obtained in this search.

[3/] The affidavit supporting the warrant (which was not attached to it or shown to the defendant at the time of the search) indicated that the agents did want to enter at the fourth set of doors which was the only entrance to the Miller-Arrington store.


(Carl's Carpet Mart)
A
(Miller-
Arrington)
B
C
D
(door)
(door)
(door)
(door)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NOS.
82-5119, 82-5120,
82-5121, 82-5122,

UNITED STATES OF AMERICA,

Appellee

v.

ANDREW MICHAEL SMITH,
STANLEY SEYMOUR PALMER,
JAMES EDWARD CHRISTY, and
ANDREW MICHAEL SMITH,

Appellants

Appeals from the United States District Court for the Middle District of North Carolina, at Salisbury. Hiram H. Ward, Chief Judge.

Argued January 14, 1983
Decided April 5, 1983

Before RUSSELL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

V. Edward Jennings, Jr., for appellant Smith; Kenneth Kyre, Jr. (Nichols, Caffrey, Hill, Evans & Murrelle on brief) for appellant Christy; William L. Cofer (Cofer and Mitchell on brief) for appellant Palmer; (E. Raymond Alexander, Jr., Alexander, Moore & Baynes on brief) for appellant Smith; David B. Smith, Assistant United States Attorney (Kenneth W. McAllister, United States Attorney, Douglas Cannon, Assistant United States Attorney, Caren W. Allen, Paralegal Specialist on brief) for appellee.

BUTZNER, Senior Circuit Judge:

Andrew Smith, Stanley Palmer and James Christy were convicted by a jury of conducting an illegal gambling business in violation of 18 U.S.C. § 1955. Smith and Palmer also were convicted of using an interstate facility (a telephone) in the promotion of a business enterprise involving gambling in violation of 18 U.S.C. § 1952(a)(3). In addition, Smith's probation was revoked on the basis of his

convictions.[1]

We affirm Palmer's convictions. We reverse Smith's and Christy's convictions because the evidence was insufficient to sustain the jury's verdict. We also vacate and remand the revocation of Smith's probation.

Count I of the indictment charged Smith, Palmer and Christy with violating 18 U.S.C. § 1955 by knowingly and willfully conducting, financing, and owning from August 5, 1979, through December 16,

---

1. This court previously reversed an order disqualifying Smith's attorney because of an alleged conflict of interest. United States v. Smith, 635 F.2d 126 (4th Cir. 1981). The court also reversed an order of the district court suppressing evidence seized in the search of premises occupied by Palmer. United States v. Palmer, 667 F.2d 1118 (4th Cir. 1981).

1979, "part of an illegal gambling business involving bookmaking and accepting wagers on sporting events."[2] To prove a violation of § 1955, the government must establish three elements: (1) the existence of a gambling business which is illegal under the laws of the state in which it is conducted; (2) the involvement of five or more persons in the operation of the business; and (3) the substantially continuous operation of the business for a period in excess of 30

---

2. Six other persons--Stephenson Price, Harry Nash, Dewey Cross, Jeffrey Littleton, Lynn James, and Henry Loman--were indicted. Nash and Loman pled guilty before trial. Only James was acquitted. Price and Cross did not appeal their convictions. Littleton filed an appeal but voluntarily dismissed it under Fed. R. App. P. 42(b).

days or gross revenues of $2,000.00 in any single day.[3]

I

Through the use of gambling records admitted in evidence against Palmer and the explanation of the records by an expert witness, the government proved every element of the offense to establish that Palmer violated § 1955. We find no merit therefore in Palmer's assertion that the evidence is insufficient to sustain the verdict of the jury on Count I. We also

---

3. It is uncontested that a gambling business, if shown to exist by the government, is illegal under the laws of North Carolina. See N.C. Gen. Stat. § 14-292 (1981). The government has proceeded in this case solely on the theory that the gambling business had gross revenues of $2,000 in a single day.

find that the evidence was sufficient to sustain Palmer's conviction on Count III for making interstate telephone calls in violation of 18 U.S.C. § 1952(a)(3) to carry on the gambling business.

Palmer's rights under the Speedy Trial Act, 18 U.S.C. §§ 3161 et seq., were not violation by his detention during the search of his premises. Officers searching a location have the authority to detain the occupants while a proper search is conducted. Michigan v. Summers, 452 U.S. 692, 705 (1981). When the officers left the premises after completing their search and seizing Palmer's records, he was no longer detained. He was not arrested until ten months later. The facts indicate the detention of Palmer during the search did not amount to an

arrest that would invoke the provisions of the Speedy Trial Act. Cf. United States v. Timpani, 665 F.2d 1 (1st Cir. 1981).

We find no cause for reversal in his other assignments of error. The judgment against Palmer is affirmed.

II

The only documents admitted against Christy were telephone toll records showing calls to and from Palmer's phone. An F.B.I. agent testified that Christy admitted running a small "poker-liquor" house and placing wagers in the fall of 1979 on football games for people, usually in the amount of $50-$100 several times a week.

The evidence against Christy, stand-

ing alone, was not sufficient to show he violated § 1955. The government sought to remedy this hiatus in its proof by linking him to Palmer's illegal gambling operation. It attempted to do this by its expert's analysis of the records admitted against Palmer, which disclosed, in addition to the illegality of Palmer's operation, that Christy was a writer for Palmer.

The evidence against Smith consisted of parlay cards and a calculator tape obtained during a search of his residence. The government also introduced a photograph of his phone and his phone toll records, which disclosed calls to and from Palmer and numerous interstate calls to two businesses that furnished information about sporting events. Testimony established that Smith was acquainted with two

codefendants, Price and Littleton, and that a bettor had placed a wager with Littleton over Smith's phone.

The evidence against Smith standing alone was insufficient to prove the elements necessary to show he violated § 1955. The government therefore sought to associate him with Palmer's gambling business. The essential link was Littleton, who was shown to be affiliated with Palmer. The government's expert testified that his analysis of records admitted against Littleton disclosed that Smith had a financial interest in Littleton's gambling activities. He did this by comparing the adding machine tape admitted against Smith with corresponding entries found in the records admitted against Littleton.

At the conclusion of the government's

case, the prosecutor moved that all evidence admitted during the trial be admitted against each of the defendants. Counsel for Christy and Smith both objected to the government's motion. After the court expressed some doubt about the motion, the prosecutor withdrew it. The prosecutor then moved that the exhibits admitted against Palmer, which established the existence of an illegal gambling business, be admitted against Littleton. The court granted this motion. The court denied a motion to admit the Palmer and Littleton exhibits against Smith, but it observed that the connection between Littleton and Smith had been sufficiently explained by the expert's analysis of the Littleton and Smith exhibits. The court subsequently denied the defendants' motions

for judgment of acquittal.

The court's instructions to the jury were consistent with the prosecutor's withdrawal of his motion that all evidence be admitted against each of the defendants and with the court's denial of the motion to admit the Palmer and Littleton exhibits against Smith. Although the court told the jury that they could consider all of the exhibits, it specifically cautioned: "You must determine the guilt or innocence of each defendant as to each separate offense charged by giving separate consideration to the evidence which applies to him as to each count."

Christy and Smith contend that the Palmer records, which disclosed the existence of an illegal gambling business, were hearsay with respect to them. Smith

makes the same contention about the Littleton records. They point out that in the absence of proof otherwise associating them with Palmer's gambling business, this hearsay was inadmissible against them. The trial court and the prosecutor seemingly recognized the validity of these contentions, for in the final analysis the incriminating Palmer and Littleton records were not admitted against them.

We conclude that Christy's and Smith's positions are sound. The evidence disclosed by the Palmer records were indispensible to linking Christy to Palmer's illegal business, and the Littleton records were indispensible to show the link with Smith. Proof that Christy and Smith phone Palmer or that Palmer phoned them is not enough to establish the connec-

tion, for only by analysis of the excluded records can it be surmised that the phone calls were incriminating. Palmer's and Littleton's records were no more than their declarations made in the absence of Christy and Smith. The expert simply deciphered these hearsay declarations to explain how they referred to Christy and Smith. Without proof independent of the Palmer and Littleton records, the association of Christy and Smith in Palmer's illegal business cannot be shown. As Glasser v. United States, 315 U.S. 60, 75 (1942), cautions: "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."

The government seeks to avoid the precept of Glasser by relying on the opinion of its expert whose analysis of the

Palmer and Littleton records provided the basis for his opinion that Christy and Smith were associated in the illegal gambling business. The government points out that Christy did not object to the expert's testimony and Smith made only a general objection.

We cannot accept the government's position. When the expert testified about the Palmer records, the records had been admitted only against Palmer. When he testified about the Littleton records, they had been admitted only against Littleton. His testimony was germane to the case against Palmer and Littleton, for it was incumbent on the government to prove the nature of the gambling business Palmer and Littleton conducted to establish the elements of § 1955. We cannot

fault counsel for Christy and Smith for assuming that testimony about exhibits that had never been admitted against them pertained only to their codefendants against whom the exhibits were admitted. Moreover, they did object when the government subsequently moved that "all of the evidence admitted during this trial be admitted as to each of the defendants." This, of course, included the expert's testimony and the exhibits on which he relied. After the court expressed some hesitancy about granting the motion, the prosecutor said: "Your honor, the government will withdraw its motion to offer the evidence previously stated . . . ."

We therefore conclude the evidence was insufficient to establish that Christy and Smith violated § 1955, and their convictions must be reversed. We direct the

remand to dismiss the charges set forth against them in Count I of the indictment. See Burks v. United States, 437 U.S. 1 (1978).

III

Smith was convicted under Count VII of violating the Travel Act, 18 U.S.C. § 1952(a)(3), which proscribes the use of interstate telephone facilities to promote or carry on a business enterprise involving gambling in violation of the laws of the state where the business is conducted. The "business enterprise involving gambling" to which reference is made in § 1952 need not be as extensive as the "illegal gambling business" defined in § 1955. Nevertheless, to prove Smith violated § 1952, the government was re-

quired to show that he made interstate phone calls to promote or carry on a "business enterprise involving gambling."

To prove Smith's guilty, the government relied on the Palmer and Littleton exhibits to show that he was associated with them in an illegal gambling business. The government's proof showed no other business enterprise involving gambling. The insufficiency of the evidence to link Smith to Palmer and Littleton therefore requires reversal of Smith's conviction for violating § 1952(a)(3).

We therefore reverse the judgment of Smith's conviction for violating § 1952 and remand for dismissal of Count VII. The record discloses that Smith's probation was revoked because of his convictions, which we have now set aside.

Accordingly, we vacate the order of revocation, without prejudice, however, to the government's right to show, if it can, any other violation of the terms of his probation.

No. 82-5119 (Smith-probation revocation), VACATED AND REMANDED;

No. 82-5120 (Palmer-Counts I and III), AFFIRMED;

No. 82-5121 (Christy-Count I), REVERSED AND REMANDED;

Now. 82-5122 (Smith-Counts I and VII), REVERSED AND REMANDED.

NO. 82-1858

IN THE

Supreme Court of the United States

October Term, 1983

STANLEY SEYMOUR PALMER, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

William L. Cofer, Esquire
COFER AND MITCHELL
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

APPELLATE PRINTING SERVICES INC. HERITAGE BLDG. RICHMOND VA (804) 643-7789

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
SALISBURY DIVISION

No. CR-80-137-01-S
No. CR-80-137-02-S

UNITED STATES OF AMERICA	)
	)
v.	)
	)
STANLEY SEYMOUR PALMER,	)
STEPHENSON ALEXANDER PRICE,	)
et al,	)
	)
Defendants	)

MEMORANDUM AND ORDER

ERWIN, District Judge

This case was noticed for hearing on December 2, 1980, in the United States Courtroom in Winston-Salem, North Carolina. Pursuant to such notice, the motions of defendants Stanley Seymour Palmer and Stephenson Alexander Price to suppress evidence seized pursuant to an allegedly

illegal search were heard by the Court. William L. Cofer and Eddie C. Mitchell argued the respective motions to suppress of defendants Palmer and Price; Douglas Cannon appeared on behalf of the Government. Based on the briefs filed by the parties, the testimony and exhibits adduced at the hearing, and other evidence appearing of record, the Court concludes that the motions to suppress of defendants Palmer and Price should be granted.

Background

Seven defendants, including defendants Palmer and Price, were indicted on October 27, 1980. Counts One, Two, and Three of the fourteen-count indictment charge Palmer and Price with violations of Title 18 United States Code, Sections

1955,[1] 1084(a),[2] and 1952(a)(3)[3]

respectively.

---

[1] § 1955. Prohibition of illegal gambling businesses.

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section——

(1) "illegal gambling business" means a gambling business which——

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolits or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct or own all or part of a gambling business and such business operates for two or more successive days, then, for the purposes of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect to such forfeiture shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and for-

feiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

[2] § 1084. Transmission of wagering information: penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interestate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or

wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[3] § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to——

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Defendant Palmer is the owner of a bar located in Winston-Salem, North Carolina and resides at 163 Charlestowne Circle, Winston-Salem, North Carolina. Defendant Price resides at Route 5, Shoaf Road, also in Winston-Salem, and is the owner and operator of Stereo City, a retail stereo equipment store, on Peters Creek Parkway in Winston-Salem.

In an affidavit made on December 14, 1980 before United States Magistrate Herman A. Smith, FBI Special Agent William T. Schatzman testified that information developed by the FBI tended to show that defendants Palmer and Price were conducting an illegal bookmaking business from the premises known as Carl's Carpet

Mart, Inc., New Lexington Road, Route 11, Box 246, Winston-Salem, North Carolina. Agent Schatzman testified further that the foregoing information gave rise to reason to believe that concealed on the persons of defendants Palmer and Price, and on the premises of Carl's Carpet Mart, Inc. was certain property including, inter alia, books, ledgers, betting slips, and sport results information which was being maintained in the conduct of an alleged gambling business.

Based on the affidavit testimony of Agent Schatzman, warrants were issued on December 14, 1980 authorizing the search of the person of defendant Stanley Seymour Palmer (see Defendant's Exhibit 6) and the person of defendant Stephenson Alexander Price and the premises known as Carl's

Carpet Mart, Inc. (see Defendant's Exhibit 5). The warrants also authorized the seizure of certain described property also believed to have been maintained in furtherance of the alleged illegal gambling activities. The warrants were executed on December 16, 1979. At that time, special agents of the FBI seized from the persons of defendant Price and Palmer, and from the premises of two adjoining offices in the rear of an area adjacent to Carl's Carpet Mart, Inc., items deemed to have been used in furtherance of the alleged illegal activity.[3] It is these items which Palmer and Price seek to suppress.

---

[3] See Defendants' Exhibits 5 and 6.

Hearing

At the hearing, defendant offered the testimony of R. Wayne Sink, a part owner and manager of Carl's Carpet Mart, Inc. (hereinafter Carl's or Area "A"). Sink testified that the land upon which the shopping center in question is located is owned by his father Raford Sink, and his uncle, Raymond Sink. Sink went on to say that on December 16, 1979, Carl's Carpet Mart, Inc. conducted its carpet sales and installation business from premises situated in the northernmost section of an L-shaped shopping center located on New Lexington Road in Davidson County, North Carolina. He stated that Carl's Carpet Mart is adjacent to but not connected with the actual location searched. Sink iden-

tified a diagram[3] as representing the general configuration of the stores in the shopping center as they appeared on December 16, 1979. Sink identified Area "A" of that diagram as representing Carl's Carpet Mart, Inc., and Area "B" of the diagram, the area actually searched, as that area most recently occupied by the Miller-Arrington appliance store. He testified that at the time of the search, the Miller-Arrington business had ceased operations, but Lacey Miller, the tenant in Area "B" had continued to use the front of the area to conduct periodic antique

---

[3] See Defendants' Exhibit 2.

auctions.[5]

Sink testified that Miller paid the rent for Area "B", although for several months prior to the search, the rental payments were actually delivered by one of the defendants. Sink stated that he supplied keys to Area "B" to defendants and that he was present when telephones were installed in the rear offices of Area "B". He stated that the phones were

---

[5] Sink testified that Miller had conducted perhaps three auctions from Area "B" during the year preceding the search, the last one having been in October 1979. Sink testified that the premises in Area "B" have been kept in a general state of disarray since the Miller-Arrington enterprise discontinued its operations. Sink stated that from the general appearance of Area "B" on the date of the search and for sometime theretofore, it did not appear that the premises were being used in the conduct of an ongoing business enterprise.

installed under the name of Carl's Carpet Mart, Inc. and that charges to those phones were billed to Carl's Carpet Mart, Inc. Sink noted that the telephone bills for Carl's Carpet Mart, Inc. were paid by him and that he would be reimbursed by defendants by that amount of the total bill attributable to the phones in Area "B".

Sink testified that there was no internal access between Carl's Carpet Mart, Inc. and Area "B", although from the outside front of Area "B", one could not determine whether the two premises were internally connected or not. Sink testified that a partition which runs parallel to the front of Carl's Carpet Mart separates the showroom area of those premises from washrooms situated in the rear corner of the store. He noted that the washrooms

are located in the rear corner of Area "A", which is adjacent to the rear office of Area "B". He stated that this partition prevents an observer from outside Area "A" from ascertaining whether a passageway exists between the washroom section of Area "A" and the rear office section of Area "B"

Sink testified further that a sign located above the store and which extended along the front roof line of Area "A" identified those premises as "Carl's Carpet Mart." He stated that no portion of that sign was over Area "B". He stated further that a glass panel over the entry way to Area "B" contained the printed words, "Miller-Arrington."

The testimony of FBI Agent William T. Schatzman was also offered at the suppres-

sion hearing. Agent Schatzman testified that he had supervised a surveillance of the shopping center for a period of approximately two months preceding the date of the search. He stated that the surveillance consisted of exterior observations of Areas "A" and "B", and an interior examination of Area "A" conducted by agents posing as customers of Carl's Carpet Mart. Agent Schatzman testified that these observations did not enable him to determine whether there existed an internal passageway which connected Areas "A" and "B".

Agent Schatzman also testified that he was the affiant for the search warrant, and that it was he who, in the company of other agents, executed the warrant on December 16, 1979. He stated that at the

time of the execution of the warrants, he and his accompanying agents entered the front part of Area "B" and proceeded directly to the rear offices of that area. Agent Schatzman testified further that the search was confined to the rear office section of Area "B". He stated that the defendants were in Area "B" at the time of the entry of the agents onto the premises and were searched. He testified further that his search revealed no passageways between Areas "A" and "B". Agent Schatzman also noted that at the time the warrants were executed, Area "B" did have the words, "Miller-Arrington," on the glass panel above the entry way to the premises, although no business appeared to be functioning from the premises at the time.

Findings of Fact

From the above, the Court is satisfied that the defendants have established by the preponderance of the evidence the following, and the Court accordingly makes these findings of fact:

1. On December 14, 1979, an extended investigation of alleged illegal gambling activities, reportedly involving, among others, defendants Stanley Seymour Palmer and Stephenson Alexander Price, led agents of the Federal Bureau of Investigation to obtain search warrants authorizing the search of "the premises known as Carl's Carpet Mart, Inc., New Lexington Road, Route 11, Box 246, Winston-Salem, North Carolina" and the search of the two defendants at said premises.

2. At all times involved herein,

Carl's Carpet Mart, Inc. occupied and carried on a retail carpet business from the northernmost portion (Area "A" on Defendants' Exhibit 2) of an L-shaped shopping center in Davidson County, North Carolina.

3. Adjacent to Carl's Carpet Mart, Inc. was a space (Area "B" on Defendants' Exhibit 2), the front part of which had been rented to and was used by one Lacey Miller as an appliance store and later as an auction site.

4. Defendants Palmer and Price were occupying and using a section of offices across the rear of and partitioned off from the area occupied by Lacey Miller.

5. Two telephones in the rear office section of Area "B" had been installed orginally with the permission of R. Wayne

Sink, part owner and manager of Carl's Carpet Mart, Inc. Sink, on behalf of his father and uncle who owned the shopping center property, collected rent payment from Lacey Miller, and later from defendants Palmer and Price.

6. Charges for the subject telephones were billed to Carl's Carpet Mart, Inc. The manager for Carl's Carpet Mart, Inc., after paying the bill each month, was reimbursed by defendants Palmer and Price.

7. A large "Carl's Carpet Mart" sign (see Defendants' Exhibit 3) extended along the northern front roof line of area "A." A roof framework over area "B" held no sign, but on a glass panel over the front doors to Area "B" were painted the words, "Miller-Arrington" (see Defendants' Exhi-

bit 4).

8. During the course of FBI surveillance, Palmer and Price were seen on repeated occasions to enter Area "B", usually letting themselves in the double front doors with keys furnished them by the landlord's agent, Sink. Neither Palmer or Price were ever seen to go in or come out of the doors to any area at the subject shopping center except those at the front of Area "B".

9. An unbroken party wall prevented any interior access between Carl's Carpet Mart and Area "B". Through large windows at the front of Area "A" and "B", government agents could see most, but not all, of the party walls separating the subject areas.

10. Posing as customers of Carl's

Carpet Mart, government agents conducted visual examinations of the interior of those premises. These examinations revealed no internal passageway connecting Carl's Carpet Mart with any part of Area "B". Government agents made no effort to explore the corner bathroom in Carl's Carpet Mart, Inc. which blocked their full view of the party wall between Carl's and the rear offices in Area "B".

11. Having in their possession a search warrant for "Carl's Carpet Mart, Inc.," federal agents on December 16, 1979 entered Area "B". They proceeded to search for and seize items from the chain of offices in the rear of Area "B" and from the persons of Palmer and Price, who were on the premises at the time.

12. The search warrant pursuant to

which officers conducted the December 16, 1979 raid did not incorporate by reference the affidavit upon which it was issued. No copy of the affidavit was served on either Palmer or Price.

Conclusions of Law

In response to defendants' motions to suppress, the Government contends that neither defendant possesses a reasonable expectation of privacy as respects the contents of the offices made the subject of the search and that both defendants are thereby deprived of standing to challenge its legality. It is the apparent position of the Government that defendants were, at best, frequent visitors to the searched premises and, as such obtained no interest sufficiently possessory in nature as to give rise to a constitutionally protected

expectation of privacy. For the reasons which follow, this Court concludes that the defendants have evidenced a relationship to the searched premises which is sufficiently substantial to give defendants a constitutionally protected privacy interest therein, and which gives defendants standing to raise challenges to the constitutional propriety of the search.

The nature of the interest necessary to maintain a motion to suppress was first defined by the United States Supreme Court in Jones v. United States, 362 U.S. 257 (1960). Petitioner in Jones occupied an apartment which he testified later was not his but that of a friend who had permitted him to use it. The apartment was entered by federal officers armed with a search warrant, narcotics were found and seized,

and petitioner was arrested and charged with violation of federal narcotics laws.[6]

In rejecting the Government's contention that the defendant lacked standing to

---

[6]The defendant in Jones was charged in a two-count indictment with violations of 26 U.S.C. § 4704(a) (repealed 1970) prohibiting the purchase, sale, dispensing, or distribution of narcotic drugs except in their original, stamped package, and 21 U.S.C. § 174 (repealed 1970), penalizing inter alia, unexplained possession of narcotic drugs. Unlike the statute here involved, the statutory provisions under which the defendant in Jones was prosecuted permitted conviction upon proof of the defendant's possession of certain items of contraband. Although the issue of "automatic standing" addressed by that Court is not here involved, the analysis of Jones and its progeny dismissing the contention that a preexisting property interest in the searched premises stands as a prerequisite to a defendant's standing to challenge the legality of a search is highly probative of the issue herein presented.

challenge the search there involved because he could assert no possessory interest in the searched apartment greater than that of a guest or invitee, the Court in Jones held that the defendant's presence in the apartment with the consent of the owner demonstrated a sufficient interest in the premises to establish him as a "person aggrieved" by the search. Id. at 265. To this extent, the decision in Jones emphasized the view that the primary interest sought to be furthered by the protection of the Fourth Amendment is that of the personal privacy of the individual. It is well settled that this right of privacy is highly personal and may not be asserted vicariously. Alderman v. United States, 394 U.S. 165 (1969); Simmons v. United States, 390 U.S. 377 (1968).

Although in Jones the Court based the defendant's standing upon his "legitimate presence" on the searched premises, since that time, the development of the law of standing in Fourth Amendment cases has turned on whether the defendant had a "legitimate expectation of privacy" in the searched premises. Rakas v. Illinois, 439 U.S. 128 (1978); Katz v. United States, 389 U. S. 347 (1967). Generally, a defendant is deemed to enjoy such an expectation where he or she adduces evidence which tends to show that the area searched is one wherein they might reasonably expect to be free of government intrusion. In the instant case, the record is replete with evidence that defendants Palmer and Price actually used and occupied the subject premises with the knowledge and

consent of the landlord's agent. It is clear, for example, that defendants were present at the time the premises were searched; defendants possessed keys to the offices in question, given to them by the agent of the landlords; defendants periodically delivered the monthly rental payments to the landlord's agent; and defendants regularly reimbursed the owners of Carl's Carpet Mart, Inc. that portion of the telephone bill setting forth charges for telephones located in the rear offices of Area "B". Such a factual setting, when viewed in light of certain photographic government evidence purporting to show how defendants attempted to secure themselves from intruders by installing heavy inside bolts on the doors to the rear offices of Area "B", makes irrestible the conclusion

that defendants have proven the existence of a reasonable and legitimate expectation of privacy with respect to the rear office of Area "B" and their contents and may therefore stand to challenge the legality of the search of those premises.

The Government next contends that the search in question did not run afoul of the constitutional requirement that the search be limited to that area particularly described in the warrant. The Government contends that upon these facts, it was "reasonable" for the agents executing the warrant to believe that the rear offices of Area "B" and the Carl's Carpet Mart premises were being used as a single unit. In support of this position, the Government relies primarily upon the coexistence of two salient factual circumstances.

First, they contend that the numbers corresponding to the telephone located in the rear of Area "B" were subscribed to by Carl's Carpet Mart, Inc. Since Carl's apparently subscribed to no other numbers corresponding to telephones located in other areas of the shopping center, save for those installed on its own premises, the Government suggests that this practice is indicative of an exercise of dominion over the rear portion of Area "B" by Carl's. Next, the Government notes that at the time of the search, and for a significant period of time theretofore, the front portion of Area "B" appeared to have been effectively abandoned as an ongoing commercial concern. The Government suggests that, when viewed together, these circumstances support the inference drawn by the FBI agents that the

rear of Section "B" was but a part of the business being conducted by the owners of Carl's Carpet Mart, Inc.

The Fourth Amendment to the United States Constitution provides, inter alia, that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The requirement of particularity of description of the place or places to be searched in search warrants is a principle deeply ingrained in Fourth Amendment jurisprudence and one scrupulously guarded by the courts. Steele v. United States, 267 U.S. 498 (1925); see also National City Trading Corp. v. United States, 487 F. Supp. 1332 (S.D.N.Y. 1980); United States v. LaMonte, 455 F. Supp. 952

(E.D. Pa. 1978); United States v. Miller, 442 F. Supp. 742 (D.Me. 1977); United States v. Votteller, 544 F. 2d 1355 (6th Cir. 1976); United States v. Johnson, 541 F.2d 1311 (8th Cir. 1976); United States v. Kaye, 432 F. 2d 647 (D. C. Cir. 1970).

The facts of United States v. Kaye, supra, are remarkably similar to those presented in the present case. In Kaye, the search warrant authorized the search of a structure identified as "3618 14th Street N.W." and described as "a two-story brick building."[7] The area to be

---

[7] The description, "a two-story brick building," was contained in the affidavit in support of the search warrant, while the description, "3618 14th Street N.W.," was contained in the search warrant itself.

searched consisted of a store operated by the defendant. The warrant did not authorize a search of 3618 1/2 14th Street, a second-floor residence with a separate entrance but part of the same building leased in its entirety to the defendant. After an unsuccessful search of the business area and the basement below, the police proceeded to search the residential premises and seized therefrom items of alleged contraband which were later offered as evidence against the defendant. In reversing a denial of defendant's motion to suppress such evidence, the Court held that where the area described in the warrant and the area actually searched are separate and distinct parts of a single structure, the description of the area to be searched set forth in the affidavit

supporting the search warrant may not be employed to expand the scope of the authorized search as set forth in the warrant itself. Id. at 649. In the instant case, there exists no dispute that the place described in both of the search warrants in question is "Carl's Carpet Mart, Inc. New Lexington Road, Route 11, Box 246, Winston-Salem, North Carolina." The parties are also in agreement that the entirety of the search in question occurred within the offices located in the rear of the area identified by the sign, "Miller-Arrington."

The Government contends, however, that where law enforcement personnel have reasonably thought that the premises to be searched were one unit, and upon executing the warrant discovered otherwise, evidence

seized pursuant thereto is not subject to suppression on grounds that the search was unconstitutionally broad in scope. In support of its position, the Government places great reliance upon United States v. Dorsey, 591 F. 2d 922 (D.C. Cir. 1978). Dorsey and the cases cited therein involve the factual situation wherein a warrant purports to authorize a search of a particular premises in its entirety where, in fact, probable cause exists only for the search of one or more subunits contained therein. The Court in Dorsey, in upholding the validity of the search, held that, in the context of subdivisions of single buildings, the constitutional requirement of particularity of description is satisfied where the warrant contains "as much specificity as police officers with

'practical accuracy' . . . may provide." Id. at 929. The Government's reliance upon Dorsey is undermined, however, by the existence of a significant distinction between the facts of that case and those here involved. In Dorsey, there was no indication that the police officers either knew or reasonably should have known that the premises described in the warrant were divided into several subunits. The premises there involved displayed no external evidence of multiple occupancy. In the present case, however, the Government admits that agents of the FBI conducted extensive surveillance of the premises, which surveillance consisted of both external and internal examinations of Carl's Carpet Mart, Inc. (See Findings of Fact 8, 9, and 10, supra.) The Government

also admits that both the Carl's Carpet Mart, Inc. premises and those of Miller-Arrington were identified by signs conspicuously placed on their respective locations. (See Findings of Fact 7.)

From the foregoing, it appears that the FBI Agents had ample opportunity to familiarize themselves with the physical configuration of the premises to be searched. It is equally apparent that, having identified the rear offices of Area "B" as the situs of the suspected illegal activity, government agents could have either sought an additional warrant which particularly identified those premises as the area to be searched or included a specific description of the offices in the rear of Area "B" on the warrant actually obtained. In view of the well settled

principle that search warrants are to be strictly construed, Keiningham v. United States, 287 F. 2d 126 (D.C. Cir. 1960), this Court is constrained to conclude that the search warrant issued on December 14, 1979 respecting the premises identified as Carl's Carpet Mart, Inc. did not authorize the search which was, in fact, conducted. Such search having been in violation of the Fourth Amendment of the United States Constitution, all evidence obtained thereby should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

ORDER

For the foregoing reasons, it is hereby ORDERED and ADJUDGED that the motion to suppress of defendants Palmer and Price

should be, and the same is hereby, GRANTED.

/s/ Richard C. Erwin
United States District Judge

January 2nd, 1981

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-5150

United States of America,

Appellee,

versus

Stanley Seymour Palmer,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Salisbury. Hiram H. Ward, District Judge.

Upon consideration of a motion of the appellant, for stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction.

/s/ William K. Slate, II
CLERK

CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of May, 1983 mailed three copies of this supplemental appendix, first class postage prepaid, to each of the following parties:

Douglas Cannon
Assistant U. S. Attorney
Post Office Box 1858
Greensboro, North Carolina 27402

Solicitor General
Department of Justice
Washington, D. C. 20530

William L. Cofer
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

No. 82-1858

In the Supreme Court of the United States

OCTOBER TERM, 1983

STANLEY SEYMOUR PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the search warrants in this case particularly described the place to be searched.

2. Whether petitioner's detention during the search triggered the provisions of the Speedy Trial Act of 1974, 18 U.S.C. (& Supp. V) 3161 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1858

STANLEY SEYMOUR PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's convictions (Pet. App. 43-60) is reported at 704 F.2d 723. The opinion of the court of appeals reversing the district court's suppression order (Pet. App. 27-42) is reported at 667 F.2d 1118. The opinion of the district court (Pet. Supp. App. 1-38) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1983. The petition for a writ of certiorari was filed on May 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of conducting an illegal gambling business, in

violation of 18 U.S.C. 1955, and of making interstate telephone calls to facilitate the gambling business, in violation of 18 U.S.C. 1952(a)(3). Petitioner was sentenced to imprisonment for 27 months and fined $10,000 on the former count; imposition of sentence was suspended and petitioner was placed on probation for five years on the latter count. The court of appeals affirmed (Pet. App. 43-60).

2. Prior to trial petitioner and a co-defendant, Stephenson Alexander Price, moved to suppress evidence seized on December 16, 1979 under two warrants authorizing a search of their persons and the premises at Carl's Carpet Mart, Inc., in Winston-Salem, North Carolina, for gambling paraphernalia. They claimed that the warrants did not give the agents the authority to search the premises. The pertinent facts concerning the search are set forth in the court of appeals' initial opinion (Pet. App. 29-36).

Briefly, the warrants were based upon an affidavit showing that the FBI had learned through informants that petitioner and Price conducted a bookmaking business over two of the four telephones billed and listed to Carl's Carpet Mart, a retail store selling carpets (Pet. App. 30-31). In the fall of 1979, FBI Agent William T. Schatzman and others conducted spot checks at the shopping center where Carl's Carpet Mart and three other businesses were located. Adjacent to the premises occupied by Carl's Carpet Mart were premises with the name "Miller-Arrington" over the entrance. The front part of the Miller-Arrington premises had once been occupied by an appliance store. Its rear area was partitioned off into private offices (*id.* at 32-33).[1]

---

[1]Before the search, Schatzman had gone into the carpet store posing as a customer, but he did not go into the rear portion of the store because it was not open to the public (C.A. App. 142-143).

During his surveillance Schatzman saw petitioner and Price enter and leave through the Miller-Arrington front door (*id.* at 33).

In executing the warrants, an FBI agent knocked on the front entrance of the Miller-Arrington premises. When petitioner unlocked the door, the agents notified him of the search warrants and then walked through the apparently abandoned front portion to the rear offices where they found Price (Tr. 353, 385-388) and the two telephones listed to Carl's Carpet Mart. The agents seized gambling records from the offices and from petitioner and Price pursuant to the warrants, detaining both petitioner and Price during a three hour search. At the conclusion of the search petitioner and Price signed returns on the warrants describing the premises searched as "Carl's Carpet Mart" (Pet. App. 35-36).

The district court granted petitioner's motion to suppress (Pet. Supp. App. 1-38). It held "that search warrants are to be strictly construed" (*id.* at 37), and that here the place described—Carl's Carpet Mart, Inc.—did not encompass the adjacent rear offices behind the Miller-Arrington store front.

3. On the government's interlocutory appeal, the court of appeals reversed (Pet. App. 27-37), concluding that the returns on the warrants signed by petitioner and Price amounted to "admission[s] * * * that the search took place on the premises authorized in the search warrants" (*id.* at 36). The court alternatively held that "[i]f a warrant specifies a place under the designation by which it is commonly known, though the exact description may not be correct, the warrant will be upheld" (*id.* at 36-37). Judge Hall dissented (*id.* at 37-42).

4. At trial, the government's evidence showed that petitioner and others conducted an illegal gambling business, in violation of 18 U.S.C. 1955, and made interstate phone calls

to facilitate the business in violation of 18 U.S.C. 1952(a)(3). The court of appeals affirmed petitioner's convictions (Pet. App. 43-49).

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the evidence seized under the search warrants should have been suppressed because the warrants failed specifically to describe the place actually searched by the federal agents. This contention lacks merit.

A search warrant must be read in a common sense fashion. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 20-21. In *Steele* v. *United States*, 267 U.S. 498, 503 (1925), this Court held that, in determining whether the identification of the place to be searched satisfies the Fourth Amendment's command of specificity, "[i]t is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." As one commentator has noted, "the primary purpose of this limitation is to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate." 2 W. LaFave, *Search and Seizure* § 4.5, at 72 (1978).

In a variety of situations, courts have found that imprecise and faulty descriptions of premises in warrants did not result in violations of the Fourth Amendment or merit suppression of evidence. For example, in *United States* v. *Gitcho*, 601 F.2d 369, 372 (8th Cir.), cert. denied, 444 U.S. 871 (1979), the court upheld a search where the address stated in the warrant, though incorrect, was reasonable for the location intended. The court said: "Of even greater importance is the fact that the agents executing the warrant personally knew which premises were intended to be searched, and those premises were under constant surveillance while the warrant was obtained. The premises which

were intended to be searched were, in fact, those actually searched." See also *United States* v. *Darensbourg,* 520 F.2d 985, 987 (5th Cir.), modified on other grounds, 524 F.2d 233 (1975). In other cases, ambiguities and defects in the description in the warrant have been found to be cured by the specificity in the affidavit when the affidavit accompanies the warrant. *United States* v. *Gill,* 623 F.2d 540, 543-544 (8th Cir.), cert. denied, 449 U.S. 873 (1980); *Moore* v. *United States,* 461 F.2d 1236 (D.C. Cir. 1972).[2] So long as there is no reasonable probability that the wrong premises might be searched, a vague or erroneous description of premises in a warrant has been found to be constitutionally sufficient.

Under these principles, the warrants here were sufficient to authorize the search that occurred. The right premises were searched, and there was no reasonable probability that the FBI agents, including the affiant, would have thought that the place to be searched was any other than the area occupied by Price and petitioner, where the phones listed to Carl's Carpet Mart were located.

The affidavit for the warrants focused on the telephones, specifying how petitioner and Price were carrying on an illegal gambling business over Carl's Carpet Mart telephones, and that gambling records were generally kept in close proximity to such telephones. It also showed that the gambling business was conducted in the area searched when football games were televised. The magistrate, in issuing the warrants to search petitioner and Price at Carl's Carpet Mart, obviously concluded that they would be found near the phones used for making wagers. When he also authorized the search of the premises at Carl's Carpet Mart, he

---

[2]In this case the affidavit was not incorporated in the warrant (see Pet. Supp. App. 22), although Agent Schatzman, the author of the affidavit, assisted in executing the warrant (*id.* at 15).

obviously intended a search of the area in the proximity of the phones, an area where petitioner and Price could have been expected to have the records they were making while conducting the gambling business. By listing the telephones used for gambling in the adjacent area in its name, Carl's Carpet Mart itself created the appearance that the two areas were part of the same business. It also concealed the identity of petitioner and Price and the business that they were conducting, and aided the gambling operation by obtaining phone service under the guise of a legitimate business. This commingling of telephone service made it natural for agents to assume that the area searched was part of the carpet store. Cf. *National City Trading Corp.* v. *United States,* 635 F.2d 1020, 1024-1025 (2d Cir. 1980).

Nor did the sign "Miller-Arrington" on the window require a limitation in the warrant. The inside of the Miller-Arrington premises looked like an abandoned business; there was no indication that it was in current use as either an appliance store or an auction site, activities that had occurred there in the past. Rather, the company in whose name the telephones were listed — Carl's Carpet Mart, whose owner also owned the shopping center — could reasonably have been thought to have taken back the premises from its previous tenant.[3]

---

[3]Nor does petitioner have any justifiable complaint, based on any reasonable expectation of privacy, that the warrant was somehow overbroad in describing the Carpet Mart itself. The scope of his Fourth Amendment privacy interest extended only to the area that he and Price were occupying, see *Rakas* v. *Illinois,* 439 U.S. 128 (1978), an area that was unquestionably subject to search under the most precise description. It did not encompass the Carpet Mart, and the breadth of the warrant consequently in no way could have affected or harmed this interest.

We recognize that the court of appeals gave, as one reason for upholding the warrants, that petitioner and Palmer each signed a return describing the premises as Carl's Carpet Mart. Whatever weight should properly be given to the designation of the premises subscribed to by petitioner—a factor that we believe the court of appeals properly considered—in this case the description used in the warrants was adequate even without regard to that factor.[4]

In any event, the fact-bound issues in this case were fully considered by the court of appeals, and present no question of sufficient importance to justify further review.

2. Petitioner also contends (Pet. 23-25) that his detention during the search amounted to an arrest on December 16, 1979, and that his subsequent indictment on October 27, 1980, violated the Speedy Trial Act of 1974, 18 U.S.C. 3161(b), because it was not filed within thirty days of his arrest. The court of appeals properly rejected this claim (Pet. App. 48-49). As the court concluded, the detention was not an arrest, but rather a detention during the search. *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981). In any event, as other courts of appeals have held, 18 U.S.C. 3162(a)(1) effectively limits Section 3161(b) to situations

---

[4]The cases relied on by petitioner—*United States* v. *Kaye*, 432 F.2d 647 (D.C. Cir. 1970), and *Keiningham* v. *United States*, 287 F.2d 126 (D.C. Cir. 1960), are readily distinguishable. In each of those cases the government was denied authority to extend its search from the described premises to include an adjacent apartment, when the authorized search proved fruitless. In this case, by contrast, the only place searched was the one where petitioner, Price, and the telephones were believed to be—and in fact were—located. And the only deficiency in the warrant, if such it was, proved to be the lack of a connecting passageway to the Carpet Mart—a fact that could not be ascertained until the warrant was executed.

where formal charges have been filed. See, *e.g.*, *United States* v. *Candelaria*, 704 F.2d 1129, 1131 (9th Cir. 1983); *United States* v. *Kubiak*, 704 F.2d 1545, 1548 (11th Cir. 1983); *United States* v. *Jones*, 676 F.2d 327, 329 (8th Cir. 1982), cert. denied, No. 81-2227 (Oct. 4, 198

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

JULY 1983

DOJ-1983-07